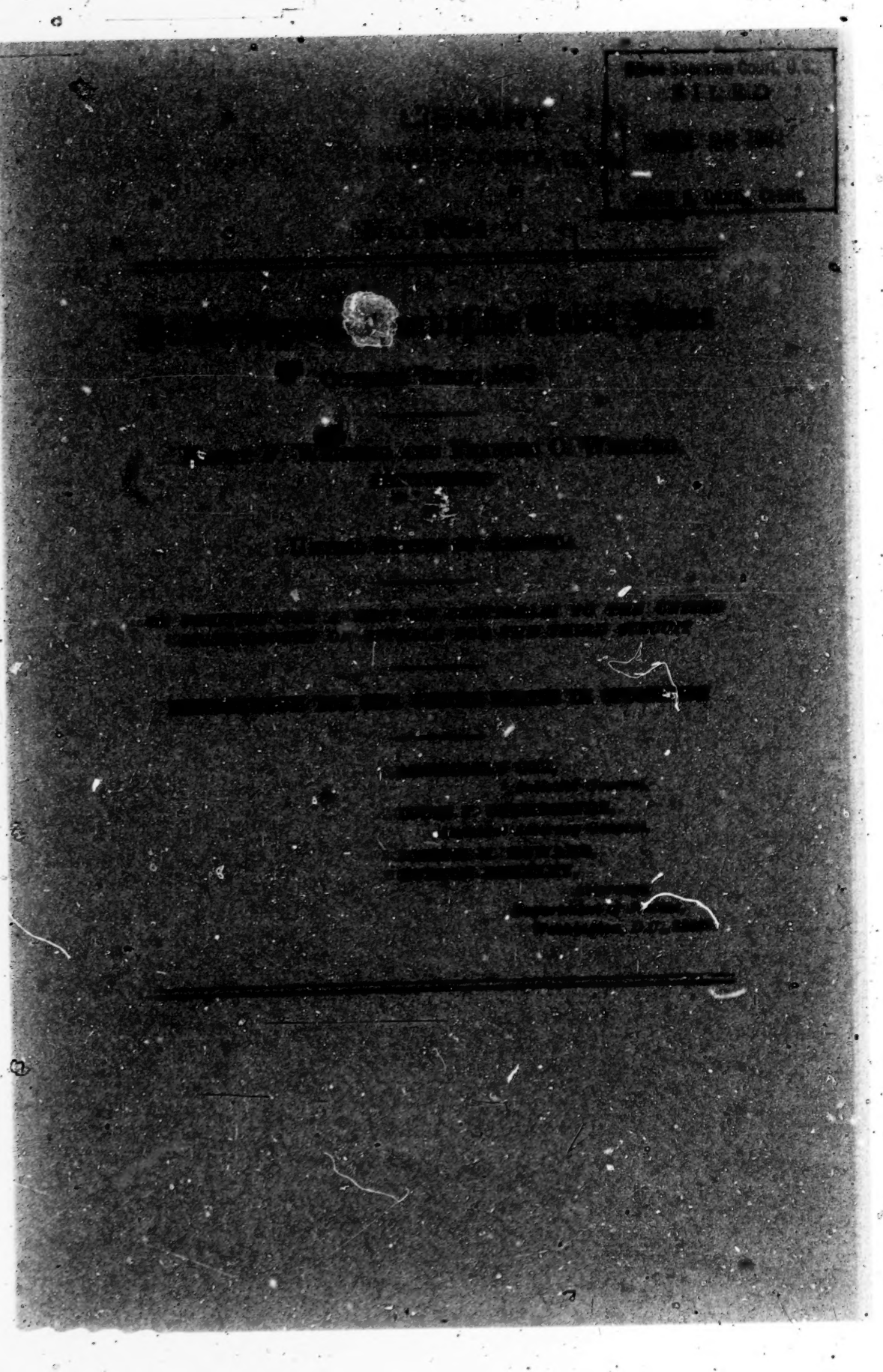

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1054

HARRY F. WERLING AND FRANCES C. WERLING,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On March 6, 1963, a four-count indictment (R. 5a–8a) [1] was returned against petitioners, Harry F. and Frances C. Werling, in the District Court for the Western District of Pennsylvania, charging them with having willfully attempted to evade and defeat a large part of their income taxes for the years 1956

[1] "R" references are to the appendix to petitioners' brief filed in the court of appeals.

through 1959.[2] After a jury trial, each petitioner was found guilty on all counts, sentenced to a total of two years imprisonment, and fined a total of $10,000. (R. 2a–3a.)[3]

Petitioners' income came from four sources during the indictment years—a service station, a partnership engaged in road construction, truck rentals, and bus routes. (R. 31a, 36a, 202a–203a, 205a; Supp. R. 11b–13b, 15b).[4] In 1950 an accountant had set up a bookkeeping system for the petitioners and he kept the books for a short time thereafter. (R. 159a, 252a–253a.) In 1951 Mrs. Werling began to keep the books herself, changing the bookkeeping system from that of the accountant to the one used in the indictment years. (R. 160a–161a, 183a–184a, 191a–192a.)

A very large portion of the petitioners' income was not reflected in the books kept by Mrs. Werling or

[2] The amounts of unreported income and of unpaid taxes as alleged in the indictment were as follows:

Count	R., Page	Year	Reported Adjusted Gross Income (Loss)	Actual Adjusted Gross Income	Reported Tax	Actual Tax Owed
1	5a–6a	1956	($382.31)	$17,351.16	0	$3,483.35
2	6a	1957	($916.05)	$32,307.32	0	$9,228.44
3	7a	1958	($8,258.07)	$25,059.03	0	$5,138.43
4	7a–8a	1959	($134.60)	$22,610.79	0	$3,215.67
Totals			($9,691.03)	$97,328.30	0	$24,067.89

[3] The sentences provided for reduction of the imprisonment to one year if the fines were paid within 60 days. (R. 2a–3a.) They were, and the terms of imprisonment have been reduced accordingly. (R. 4a.)

[4] "Supp. R." references are to the Appendix to the government's brief filed in the court of appeals.

on the petitioners' tax returns after 1952. (R. 150a–152a.) The major item in this category was truck rentals. (R. 34a–35a, 48a–51a; Supp. R. 1b–8b, 15b–23b.) In 1951 and 1952, these had been recorded in the books as cash sales, and so were reflected in taxpayers' gross receipts on their tax returns for those years. (R. 151a–152a.) After December 31, 1952, however, they were no longer shown on the books as income items and they were not reflected on the petitioners' tax returns. (R. 34a–36a, 152a.) These rental items totaled $18,648.83, $31,127.37, $30,215.63 and $23,583 for the years 1956, 1957, 1958, and 1959, respectively. (R. 109a, 111a–112a.)

Other unrecorded and unreported items consisted of certain checks paid to Mr. Werling by the partnership (R. 37a, 40a, 51a–52a, 154a; Supp. R. 14b, 23b–25b) and receipts from the use of a school bus furnished by petitioners (R. 36a, 111a–112a; Supp. R. 8b–11b, 32b–33b). Together, these items amounted to several thousand dollars in each of the years 1957, 1958, and 1959. The checks from the partnership were also unreported in 1956 and petitioners' 1959 return further failed to include $208.85 in interest from a savings account which, though never mentioned by petitioners during the first eight months of the special agent's investigation, had a balance of $28,856.45 at the close of the indictment period (R. 48a, 112a, 283a).[5]

[5] Most of the deposits to this account consisted of checks from the partnership, and the deposits in 1959 alone totalled approximately $25,000. (Supp. R. 27b–29b, 35b.) The government showed other large cash expenditures during this pe-

1. Petitioners' contention (Pet. 7–10) that the government failed to prove willfulness is rebutted by the record. The evidence of willfulness was overwhelming.

First, there was "evidence of a consistent pattern of underreporting large amounts of income, and of the failure on petitioners' part to include all of their income in their books and records." *Holland* v. *United States*, 348 U.S. 121, 139. See also *United States* v. *Alker*, 260 F. 2d 135, 148 (C.A. 3), certiorari denied, 359 U.S. 906; *United States* v. *Frank*, 245 F. 2d 284, 287 (C.A. 3), certiorari denied, 355 U.S. 819. The clear inference of willfulness from this behavior is further buttressed by the fact that the major sources of omitted income, the truck rentals and checks from the partnership, were reflected in petitioners' gross receipts on their tax returns in 1951 and 1952, but not in the indictment years. Beyond this, petitioners' pattern of spending during these years[*] made implausible their claim that they were unaware of their taxable income. *United States* v. *Cindrich*, 241 F. 2d 54, 56 (C.A. 3). Finally, petitioners' long failure to disclose to the Service the existence of the savings account into which they had deposited over

---

riod. For example, petitioners repaid almost $28,000 worth of bank loans during the years 1956 through 1959. (Govt. Ex. 25; Supp. R. 29b, 33b–35b.) In 1957 they spent in excess of $10,000 in remodeling their home and purchasing major appliances for it. (R. 91a–104a.) In the same year they bought a new Cadillac, and they traded in the Ford car which they used in their business on a new Ford in 1956, 1958, and 1959. (R. 227a, 239a, 280a–281a.)

[*] See fn. 5, *supra*.

$28,000 from 1957 through 1959 itself tends to show willfulness. *Sherwin* v. *United States*, 320 F. 2d 137, 141–142 (C.A. 9), certiorari denied, 375 U.S. 964.

The fact that Mrs. Werling kept the books, although a factor for the jury to consider in determining Mr. Werling's guilt, could hardly require an acquittal. A taxpayer cannot insulate himself from prosecution merely by having another person keep his books and prepare his tax returns. Mr. Werling was always present when the accountant was given the information to prepare the tax returns, and he had access to the books. It was for the jury to determine whether or not he was aware of what they contained. Indeed, considering his obvious ability as a businessman, whose gross receipts were over $100,000 a year, it is highly unlikely that he could have been as uninformed and uninterested in his business income as he would have had the jury believe (R. 224a, 227a–231a, 238a–239a).

2. Petitioners' contentions (Pet. 10–11) that the district court erred in admitting certain testimony are insubstantial.

Special Agent Tymoczko was recalled as a witness for the sole purpose of testifying as to facts which his investigation revealed, *i.e.*, that in 1951 and 1952 the truck rentals and checks from the partnership were entered on petitioners' books as cash sales, and so were part of the gross income reported in their tax returns for those years. (R. 150a–152a.) Such direct evidence of facts learned during an agent's investigation is of course admissible, as even the cases

relied upon by petitioners show (Pet. 10). See *United States* v. *Michener*, 152 F. 2d 880, 883 (C.A. 3), and *United States* v. *Ward*, 169 F. 2d 460, 462 (C.A. 3).

Revenue Agent Lipski testified as an expert as to his computation of unpaid taxes. (R. 104a–114a.) He stated that everything in this computation came from the testimony and exhibits introduced at the trial (R. 106a–107a), and, during an extensive cross-examination (R. 114a–141a), petitioners' counsel was unable to show that any items were not based on evidence in the record. The computation was therefore admissible. *United States* v. *Johnson*, 319 U.S. 503, 519; *United States* v. *Ward*, 169 F. 2d 460 (C.A. 3).

For the reasons set forth above the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
JOSEPH M. HOWARD,
BURTON BERKELEY,
Attorneys.

MAY 1964.